

# The Catholic Lawyer

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Volume 1  
Number 3 *Volume 1, July 1955, Number 3*

Article 2

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April 2016

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### Recommended Citation

Anthony F. LoGatto, M.S.S.S., LL.B. (1955) "Artificial Insemination: I - Legal Aspects," *The Catholic Lawyer*. Vol. 1 : No. 3 , Article 2.

Available at: <https://scholarship.law.stjohns.edu/tcl/vol1/iss3/2>

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*This article highlights some of the legal involvements created by the artificial insemination of human beings. The practice violates both the natural law and the common law and, in some jurisdictions, statutory law. The moral and sociological aspects will be considered in the next issue.*

# ARTIFICIAL INSEMINATION: I LEGAL ASPECTS

ANTHONY F. LOGATTO, M.S.S.S., LL.B.\*

THE STRIDES of science have brought blessings to mankind. Indeed modern living, stripped of the findings of the laboratory, would be a toilsome and narrow existence, wherein the struggle for survival would shackle man to the grim reality of preservation of life and species.

Yet progress has brought its problems too – social, economic, ethical, legal or a complexion of them. This seems to be the case with artificial insemination. Originally used in animal husbandry as early as the eighteenth century (although the so-called “Arab legend” goes back further than that), it was successfully performed on a human being in 1799 by the famous English physician, John Hunter.<sup>1</sup> In America, Doctor Marion J. Sims reported his work on artificial human insemination in 1866.<sup>2</sup> It is interesting to note that throughout the nineteenth century and even in the first two decades of the twentieth century, all the pertinent literature with few exceptions refers to *homologous* artificial insemination, commonly referred to as AIH, wherein the specimen of sperm used is obtained from the husband of the woman.<sup>3</sup> Apparently, the first report of an instance of *heterologous* artificial insemination, referred to as AID, wherein the specimen of semen is obtained from a third party donor, was made by one A. D. Hard in 1909.<sup>4</sup>

Today the practice of artificial insemination is common enough and

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<sup>1</sup>Glover, *Artificial Insemination Among Human Beings* 4-5 (1948).

<sup>2</sup>*Id.* at 5.

<sup>3</sup>*Id.* at 8-9.

<sup>4</sup>*Id.* at 11.

while statistics are necessarily incomplete because of the secrecy demanded in this procedure yet available data shows it to be widespread.<sup>5</sup> A study,<sup>6</sup> completed in 1941,



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was made by circularizing 30,000 physicians most likely to be associated with artificial insemination. Of this number, 22,358 doctors failed to reply to the survey letters. The survey revealed that 9,489 children were born in

the United States as a result of artificial insemination, both homologous and heterologous. The number of "test tube" babies, as they are called, is estimated to be about 50,000 throughout the United States and at least 10,000 in New York City.<sup>7</sup> One writer reports an estimate of 1,000 to 1,200 babies born yearly in the United States conceived through artificial insemination as contrasted with four million normally conceived children.<sup>8</sup> As evidence of the growing popu-

larity of artificial insemination, two sperm banks have been set up, one in Iowa and one in New York.<sup>9</sup> These banks have been established in order to give attending physicians a large and diversified number of specimens from which to match the husband's characteristics.

The subject of artificial insemination is related, of course, to the problem of fertility and sterility in marriage. Medical authorities place the number of sterile marriages at percentages varying from ten to sixteen percent of all married couples in the United States.<sup>10</sup> "Every year in the United States," reports one expert, "about 50,000 women leave the marriage altar, later to discover they cannot have children, while about 2,000,000 couples who are of child-bearing age are constantly in that condition."<sup>11</sup> Since medical authorities have found that sterility is almost as often due to male deficiency as female deficiency,<sup>12</sup> there are about one million cases where AID is a possibility. Aggravating the situation is the fact that the number of babies available for adoption is far short of the number of requests for adoption on the part of childless

<sup>5</sup>See Rohleder, *Test Tube Babies. A History of Artificial Impregnation of Human Beings* (1934); Abel, *The Present Status of Artificial Insemination, Surgery, Gynecology and Obstetrics - International Abstracts of Surgery* 85 (1947) and Supplement 521; Folsome, *Status of Artificial Insemination: A Critical Review*, 45 *Amer. J. Obst. and Gynec.* 915 (1943).

<sup>6</sup>See Seymour and Koerner, *Artificial Insemination: Present Status in the United States as Shown by a Recent Survey*, 116 *J. Amer. Med. Assn.* 2747 (June 21, 1941).

<sup>7</sup>N.Y. Post, Mar. 28, 1955, pp. 4, 18.

<sup>8</sup>Lang, *Artificial Insemination - Legitimate or Illegitimate?*, *McCall's* 60 (May, 1955). Some of these statistics, however, have been criticized as to

accuracy and reliability and therefore any figures given must be treated with reserve at this time. Folsome, *The Status of Artificial Insemination: A Critical Review*, 45 *Amer. J. Obst. and Gynec.* 913, 917-922 (1943).

<sup>9</sup>Ratcliff, *Are These the Most Loved Children?*, *Woman's Home Companion* 56 (March, 1955).

<sup>10</sup>Warner, *Artificial Insemination in Cases of Incurable Sterility*, *Papers Delivered before the Society of Medical Jurisprudence* 201 (1954).

<sup>11</sup>2 Brewer, *Marriage Hygiene* 420 (1936).

<sup>12</sup>Berustein, *Plain Talk About Sterility*, *Argosy* 31 (Jan., 1949). Dr. Warner indicates that the husband is the sterile factor in from thirty to fifty percent of childless marriages. Warner, *supra* note 10 at 200.

couples.<sup>13</sup> Expediting adoption procedures and facilitating foreign adoptions would help alleviate what is a distressing problem today with two million childless couples throughout the nation.

The practice of artificial insemination, however, poses thorny and perplexing questions of a legal, ethical and sociological nature. The legal aspects are in a state of confusion. Ethically, the position of the Catholic Church is clear and unequivocal, but most other denominations are not committed to one side or the other. Socially, the impact is still to be determined. It is the burden of this paper to review the legal aspects of artificial insemination; the ethical and sociological aspects will be considered in a subsequent article.

### Early Cases

The earliest case of artificial insemination to appear on record is a French case in the Tribunal of Bordeaux, 1883.<sup>14</sup> In an action to collect medical fees, a doctor claimed 1,500 francs for artificial insemination performed on the defendant. The court severely reprimanded the doctor for a breach of confidential relationship of doctor and patient and for employing means "contrary to the natural law and ones which could constitute a veritable social danger."<sup>15</sup>

A Commission appointed by the *Société de médecine légale de France* to review the matter, agreed that there had been a violation of medical secrecy, but did not agree that artificial insemination was against the

natural law and could create a danger to society. The Commission went further and gave the opinion that artificial insemination "was the last chance to obtain procreation by a correct operation involving not a single responsibility."<sup>16</sup> This appears to have been a case of *homologous* artificial insemination.

The next case appears in Dusseldorf, Germany, in 1905.<sup>17</sup> A husband, who alleged that there had been no cohabitation between himself and his wife (there had been several fruitless attempts early in the marriage), contested the legitimacy of a child born to his wife in 1904. After the husband was examined by a medical expert, the court denied the husband's action and affirmed the legitimacy of the child. On appeal to the higher court of Cologne, another medical expert testified to the impossibility of artificial fertilization. Despite this medical expert's testimony, the decision of the lower court was affirmed in 1907. In 1908, the German Supreme Court recognized artificial insemination as legal and held that a child conceived by the semen of the husband was legitimate and had all the rights of a legitimate child.

It should be carefully noted at this point that no court has ever found any difficulty where the sperm used is that of the husband. Courts have taken the position that there may be ethical, esthetic and sociological aspects involved in *homologous* artificial insemination, but that legally the practice is unobjectionable. The difficulty arises in *heterologous* insemination; that is, when a third party, not the husband, is the source of the specimen of semen used.

The much-quoted Canadian case of

<sup>13</sup>Approximately 1 million couples make applications in the United States to adopt children, but only 75,000 children are legally available during that same period. New York Times, Apr. 5, 1952, p. 18, col. 1.

<sup>14</sup>See Glover, *op. cit. supra* note 1 at 44.

<sup>15</sup>*Ibid.*

<sup>16</sup>*Ibid.*

<sup>17</sup>*Id.* at 45.

*Orford v. Orford*,<sup>18</sup> in 1921, for the first time expressed an opinion on *heterologous* insemination. In the two prior cases, the courts assumed that insemination had taken place by the use of the husband's semen. It is interesting that what attracted special notice in the *Orford* case was not the specific holding of the case, which was one of ordinary adultery, but rather the dicta, which commented at length on the legality of artificial insemination of the extra-marital type.

The case was brought in the Ontario Supreme Court as an action for alimony. The plaintiff and defendant were married in Toronto, in August, 1913. The couple sailed to England for the honeymoon. In November of the same year, the defendant left his wife in England and returned to Canada. It was admitted at the trial that the marriage had not been consummated, owing, as the plaintiff said, to the great pain which an attempt at intercourse caused her, and owing to the fact as she discovered later, that she had a retroflexed uterus. In December, 1919, however, the plaintiff returned to Canada but the defendant husband refused to accept her back. The plaintiff then instituted this action for alimony in January, 1920. The husband's defense was that the plaintiff, by mutual agreement, had remained in England to effect a cure of her physical inability to consummate the marriage and had not done so.

While the case was pending, the defendant learned that while the plaintiff was in England, she had given birth to a child in February of 1919. The plaintiff admitted the birth of the child and that the defendant was not the father. The plaintiff's explana-

tion was that she had been treated by her physician for some time in an effort to cure her inability to consummate the marriage, but that he refused to operate without her husband's consent. Instead, the physician recommended that the plaintiff bear a child and that artificial insemination be used. A friend offered to be the donor if the plaintiff would undergo the insemination and he further promised to pay all the expenses connected with her pregnancy and confinement and to adopt the child as his own. The plaintiff testified that she agreed and that a physician, whose name she could not remember, placed her under an anesthesia. When she regained consciousness the plaintiff was told by the friend that she had been inseminated artificially by semen taken from his body and introduced into hers by the physician. Mrs. Orford further testified that the procedure was repeated once again in May, 1918. The plaintiff became pregnant and a child was born in February, 1919. The court noted that the plaintiff, "throughout the whole course of her extraordinary story seemed to have a very slight appreciation of the gravity of what she had done." She constantly referred to it as a "medical cure" for her affliction.

The court observed that there was nothing "medical" about the insemination nor was there anything "artificial" about it. It concluded upon the facts that her story as to the artificial insemination "is not to be believed," and found that the plaintiff was guilty of adultery in that she had had sexual intercourse in the ordinary way with the aforementioned friend.

Had the court limited the opinion to the above facts, the case would probably have been relegated to dusty archives and forgotten. But, to avoid the suggestion that the plaintiff had been prevented from establish-

<sup>18</sup>58 D. L. R. 251 (1921).

ing as a matter of law that her conduct, as she related it, did not constitute adultery, the opinion discussed that aspect of the case also. It was the contention of the plaintiff, first, that it was not adultery for a woman to become "artificially impregnated" by means of a man not her husband and without her husband's knowledge; and, second, that even if it might be adultery *per se*, it was not so in these circumstances because what she did was "conducted to" by the conduct of her husband. Counsel for the plaintiff argued that to constitute adultery there must be actual sexual intercourse in the ordinary, natural way and that the essential element of adultery rested on the moral turpitude of the act of sexual intercourse as ordinarily understood. Counsel also distinguished between the act of adultery and the consequences of it.

In rejecting these arguments, the court summarized its position with cogency and clarity:

... the essence of the offence of adultery consists not in the moral turpitude of the act of sexual intercourse, but in the voluntary surrender to another person of the reproductive powers or faculties of the guilty person; and any submission of these powers to the service or enjoyment of any person other than the husband or wife comes within the definition of "adultery."

The fact that it has been held that anything short of actual sexual intercourse, no matter how indecent or improper the act may be, does not constitute adultery, really tends to strengthen my view that it is not the moral turpitude that is involved, but the invasion of the reproductive functions. So long as nothing takes place which can by any possibility affect that function, there can be no adultery; so that, unless and until there is actual sexual intercourse, there can be no adultery. But to argue from that, that adultery necessarily begins and ends there is utterly fallacious. Sexual intercourse

is adulterous because in the case of the woman, it involves the possibility of introducing into the family of the husband a false strain of blood. Any act on the part of the wife which does that would, therefore, be adulterous. That such a thing could be accomplished in any other than the natural manner probably never entered the heads of those who considered the question before. Assuming the plaintiff's story to be true, what took place here was the introduction into the body by unusual means of the seed of a man other than her husband. If it were necessary to do so, I would hold that in itself was "sexual intercourse." It is conceivable that such an act performed upon a woman against her will might constitute rape.<sup>19</sup>

This portion of the opinion, although dicta, was to be the subject of much comment pro and con. Indeed, more recently it has been the butt of some very bitter and caustic attacks.<sup>20</sup>

The court, however, was not alone in its view on what constitutes adultery. Shortly thereafter, in 1924, Lord Dunedin, in the case of *Russell v. Russell*,<sup>21</sup> made the observation that the essence of adultery was not intercourse but rather fecundation *ab extra*. Lord Dunedin reported the matter thus: "... she [the wife] had denied intercourse of any sort with any man not her husband; she had admitted that her husband had never effected penetration. . . . The jury . . . came to the conclusion that she had been fecundated *ab extra* by another man unknown, and fecundation *ab extra* is, I doubt not, adultery."<sup>22</sup>

In another English case, *L v. L*,<sup>23</sup> the

<sup>19</sup>*Id.* at 258.

<sup>20</sup>See Warner, *supra* note 10 at 195; Schwartz, Some Legal Aspects of Artificial Insemination, 18 Queens Bar Bull. 91 (1955).

<sup>21</sup>[1924] A. C. 687.

<sup>22</sup>*Id.* at 721.

<sup>23</sup>[1949] 1 All E. R. 141.

parties were married in 1942 and although there was no physical incapacity on the part of the husband or wife, the marriage was never consummated owing to the husband's psychological attitude in sexual matters. The wife, however, anxious to bear a child, was artificially inseminated in December, 1947, from the husband's seed. In January of the next year, the parties ceased to live together, although, unknown to the parties, the wife was pregnant as a result of the artificial insemination. In September, 1948, the wife gave birth to a child. In a suit by the wife for a decree of nullity, the court held that the wife was not estopped as against the husband by her conduct because he was not misled by it into thinking that the wife had acquiesced in an abnormal marriage, nor had he as a result of it altered his position for the worse. The court went on to say that the conception of the child under the circumstances did not constitute "approbation" of an abnormal marriage toward the world at large nor did public policy demand that the court hold the conduct of the wife to be such an approbation. On the contrary, said the court, the fact that the decree would bastardize the child was no ground for refusing the decree, which was therefore granted on the ground of incapacity. It would appear, therefore, that in England artificial insemination alone does not effect the consummation of the marriage.

### American Precedents

The first recorded American case involving artificial insemination appeared as recently as 1948 in the Circuit Court of Cook County, Illinois. In *Hoch v. Hoch*,<sup>24</sup> a set of facts somewhat similar to *Orford v. Or-*

*ford* was presented in which extra-marital artificial insemination was alleged. The judge found, however, that there had been adulterous sexual relations in the ordinary sense and granted the plaintiff husband a divorce on that ground. The judge ventured the opinion, by way of dicta, that even if artificial insemination had been proved it would not be adultery such as to constitute grounds for divorce.

Shortly after the *Hoch* case in Chicago, the New York case of *Strnad v. Strnad*<sup>25</sup> was decided. A couple, separated by judicial decree, was before the court at the instance of the wife who contested her husband's right of visitation to a child born during their marriage. The court assumed, in the light of the record and the concessions made by the defendant, that the plaintiff wife was artificially inseminated with the consent of the defendant and that the child was not of the blood of the defendant. Predicated on that assumption the court came to the conclusion that the defendant was entitled to rights of visitation as theretofore allowed as the evidence did not show the defendant an unfit guardian but did indicate that the best interests of the child called for reasonable visitations.

At this point, the court made an unusual argument. It ventured the opinion that the child had been "potentially adopted or semi-adopted by the defendant" and that the defendant was "entitled to the same rights as those acquired by a foster parent who has formally adopted a child, if not the same rights as those to which a natural parent under the circumstances would be entitled."<sup>26</sup>

<sup>24</sup>Chicago Sun (Feb. 10, 1945); Time Magazine 58 (Feb. 26, 1945).

<sup>25</sup>190 Misc. 786, 78 N.Y.S. 2d 390 (Sup. Ct. 1948).

<sup>26</sup>*Id.* at 787, 78 N.Y.S. 2d at 392.

In the *Strnad* case, the first in the United States to consider at length the issue of extra-marital artificial insemination, one senses, with some sympathy, the anxious efforts of a judge striving in some way to safeguard the legitimacy of a child faced with the two-fold jeopardy of disputed paternity and contested custody. The benevolence of a judge's feelings, however, and the stringency of his logic are not, unfortunately, always equated.

In the *Strnad* case, the court was hard put, it seems, to find arguments to sustain the position that the artificially inseminated child (by donor) is legitimate. It was the first to find that such a child was "potentially adopted" or "semi-adopted" by the husband of the mother. There is little support for this view in the New York statutes. The words "potentially adopted" in New York State mean nothing. Article 7, Section 110 of the Domestic Relations Law provides that an adult husband or an adult wife may adopt the child of the other spouse, whether born in or out of wedlock. But the same section provides that no person shall be adopted except in accordance with Article 7 of such law which provides specifically that an adoption is a legal proceeding of a judicial nature.

Therefore, unless there is a formal, legal adoption of the child by the husband of the mother the status of the child remains unchanged. In this case, since no legal adoption was alleged or proved, the only conclusion open to the court should have been that the child was illegitimate. For implicit in the reasoning of the court was the premise that the child was born out of wedlock; otherwise why postulate a "potential" adoption? The inconsistency of holding a child admittedly born out of wedlock, legitimate, because of an "adoption" which in

law never took place, is obvious. In this instance it must be attributed to the efforts of the court to steer between two undesired results — either of declaring this child (and all other children so conceived) illegitimate or of deliberately evading the provisions of the law.

The court in the *Strnad* case extended itself in the interest of preserving a child's legitimacy. The learned justice says in the course of his opinion: "assuming again that the plaintiff was artificially inseminated with the consent of the defendant this child is not an illegitimate child. Indeed, logically and realistically, the situation is no different than that pertaining in the case of a child born out of wedlock who by law is made legitimate upon the marriage of the interested parties."<sup>27</sup> That rule of law obtains only when the actual mother and father of a child born out of wedlock marry each other. But in this case, the father of the child is admittedly not the husband of the mother and certainly never married the mother. The illegitimacy of the child which was only implicit in the opening paragraphs of the opinion is here spelled out in express language. Since the inter-marriage of father and mother is definitely excluded, it would seem that on appeal the holding of the lower court would be reversed on the basis of this reasoning alone. Apparently in the nature of a saving clause, the court concludes the opinion with some modest limitations: "The court does not pass on the legal consequences insofar as property rights are concerned in a case of this character, nor does the court express an opinion, on the propriety of procreation by the medium of artificial insemination. With such matters the court is not here concerned; the latter problem particularly is

<sup>27</sup>190 Misc. 786, 787, 78 N.Y.S. 2d 390, 392 (Sup. Ct. 1948).



in the fields of sociology, morality and religion."<sup>28</sup>

To complicate the matter further, Mrs. Strnad, subsequent to this decision removed the child from the New York jurisdiction by taking it to Oklahoma. The New York court held the wife in contempt for refusing to obey the court order allowing the husband visitation rights.<sup>29</sup> But an Oklahoma court held that the husband had no rights of visitation because he was not the biological father of the child.<sup>30</sup>

This was the legal status of artificial insemination until late in 1954 when the matter was revived in the now famous case of *Doornbos v. Doornbos*.<sup>31</sup> The plaintiff wife, appearing in Superior Court of Cook County, Illinois, asked for a declaratory judgment on the following:

1. Artificial insemination is not contrary to public policy.
2. Artificial insemination does not constitute adultery.
3. A child born of artificial insemination is legitimate and the child of the mother only and the father or husband has no rights to said child.

The court, however, held that:

1. Heterologous Artificial Insemination (when the specimen of semen used is obtained from a third party or donor), with or without the consent of husband, is contrary to public policy and good morals and constitutes adultery on the part of the mother. A child so conceived is not a child born

in wedlock and therefore illegitimate. As such it is the child of the mother and the father has no right or interest in said child.

2. Homologous Artificial Insemination (when the specimen of semen used is obtained from the husband of the woman) is not contrary to public policy and good morals, and does not present any difficulty from the legal point of view.

This opinion caused an avalanche of public comment by the popular press, professional groups and individuals. Newspaper articles featured such catching headlines as "Tempest in a Test Tube," "Test Tube Mother Ruled Adulteress," "Test Tube Adultery Affirmed by Court." Bar journals, legal and medical periodicals, rushed to the fore with particular views although only one of the professional organizations has taken an official position on the matter.<sup>32</sup> The subject was a bonanza for the popular magazines, many of which ran articles on the decision and the general subject of artificial insemination; some of which were very indignant and heart-tugging.

Most of the popular literature favors the practice of AID, demanding that the various legislatures enact statutes to legitimize AID babies and bring happiness to so many thousands of hopeless, hapless couples whose marriages were ready to disintegrate for lack of a bouncing baby in their midst. Most of the authors evaluated the matter from an emotional point of view. Some relied on the asexual nature of the insemination

<sup>28</sup>*Ibid.*

<sup>29</sup>83 N.Y.S. 2d 391 (Sup. Ct. 1948).

<sup>30</sup>Caddy, Artificial Human Insemination, 12 N.Y. Co. Lawyers Bar Bull. 193 (1955).

<sup>31</sup>No. 54 S. 14981 (Superior Ct., Cook Co. Dec. 13, 1954).

<sup>32</sup>The American Society for the Study of Sterility has approved the practice. N.Y. Times, June 5, 1955, p. 53, col. 1. Exception to this position was taken by the Federation of Catholic Physicians at the guild's annual meeting. The Register, June 19, 1955, p. 1, col. 7.

process to exclude any question of adultery or immorality, arguing that since there is no carnal connection, artificial insemination is no more immoral than a blood transfusion or a corneal transplant. Few came to grips with the more basic thinking as expressed in the *Orford* case which measured the morality of artificial insemination by the exclusiveness of the reproductive functions and the purity of the blood strain. Most proponents of artificial insemination rest their case on the cruelty and heartlessness of leaving so many couples in the barrenness and emptiness of a childless home. The opponents rely substantially on the reasoning of the *Orford* case and see no escape from its logic and straight, down-the-line thinking.

The next step lies with the appellate courts, when and if the issue of artificial insemination is presented to them for review. In the meanwhile, the law is confusing and inconsistent.

### Question of Legitimacy

In Canada, relying on the *Orford* case, the "test tube" child (by donor) would seem to be illegitimate. In England, a child born as a result of homologous artificial insemination would now be considered legitimate as a statute has been enacted to overcome the decision of the *L* case.<sup>33</sup>

In the United States, it depends on the jurisdiction. In New York, the child is legitimate on the shaky reasoning of the *Strnad* case. In Illinois, according to the *Doornbos* case, the child is not legitimate.

Even in those jurisdictions where an AID child is considered illegitimate, the problem of establishing the illegitimacy of the child would, in most instances, be difficult. The

general rule in the United States is that a child born in lawful wedlock is presumed legitimate. This presumption is rebuttable but only by evidence irrefragably establishing the illegitimacy. A probability will not suffice. The law is equally as clear in most jurisdictions that the testimony of either of the spouses or both of them, as to non-access, is inadmissible to rebut the presumption. Moreover, in most states, neither husband nor wife can testify concerning adultery. It would seem therefore, that neither husband nor wife could testify that the child had been conceived through artificial insemination.

In those jurisdictions where the AID child is not legitimate, the status of the child is the same as that of children born out of wedlock. The child, therefore, may not inherit from the estate of the donor. The possibility that an AID child may or may not be legitimate according to the place of his birth creates additional problems. Questions of citizenship might arise when the donor is domiciled elsewhere than the mother. In one case a specimen of semen was flown from a bank in New York to Montreal.<sup>34</sup> A legal question as to the citizenship of the child — whether American or Canadian — might arise. To determine that question would affect not only the citizenship of the child but his legitimacy, since in Canada it would appear such a child is illegitimate whereas in New York he would be legitimate.

### Question of Adultery

Further difficulties exist, multiplying themselves by the number of people involved. If the child is implicitly illegitimate, is the mother therefore an adulteress? Can

<sup>33</sup>Law Reforms Act of 1949, c. 100.

<sup>34</sup>Ratcliff, *Are These the Most Loved Children?*, *Woman's Home Companion* 56 (March, 1955).

you have the legitimate birth of an illegitimate child? Can the husband of a woman who was inseminated without his knowledge and consent proceed against her in an action for divorce on the grounds of adultery? Admittedly, if with the husband's knowledge and consent, he is estopped by his own complicity.<sup>35</sup>

Adultery in civil law, especially in divorce proceedings, is not as specifically defined as in criminal law. The crime of adultery is determined by the statute of the particular jurisdiction in which the crime is prosecuted. Furthermore, criminal statutes are always strictly construed. Hence, evidence which might be adequate as grounds for a decree of divorce may be insufficient to sustain a prosecution for the crime of adultery.

If the husband has not consented to the artificial insemination, the husband may have an action in damages against the doctor and the donor. If insemination leads to illegitimacy and adultery, is it not automatically forbidden by law as against strong public policy?

### Liability of Physician

The physician involved in artificial insemination also finds himself in a very precarious position. If the mother, in an AID case, is under the age of consent there is a possibility that the physician may be guilty of statutory rape.

A more concrete problem presents itself in the matter of birth certificates and records. Where the attending physician at birth was also the attending physician at the insemination, whose name should he inscribe as the father of the child? If he puts the donor's name, or says the father is unknown,

the child is at once branded as illegitimate. If he inserts the husband's name, he is guilty of falsifying an official record. One solution adopted by some doctors is to let another physician, without any knowledge of the artificial nature of the conception, handle the confinement and delivery. In good faith, the second physician writes in the husband's name as the father of the child. Obviously this is an evasion rather than an avoidance of the law and introduces deception and trickery into a profession where ethical behavior is of paramount importance.

There are other pitfalls which attend the physician as he is called upon to enter the new pathways of science. In the event that legitimate children were to be born in the same family where an AID child had been introduced (and it happens often enough in adoption cases) may they charge that the physician had conspired to deprive them of their lawful share of an inheritance?

In one case in which the husband of a woman who had an AID child was indicted for abandonment, the child was reported to have been mongoloid.<sup>36</sup> If this were so, might a cause of action lie against the doctor who performed the insemination? One writer asks rather impertinently "Is there a real or implied warranty on his [the physician's] part as to the 'quality' of the donor he selects, his antecedents, his stock, etc.?"<sup>37</sup> The Bureau of Legal Medicine and Legislation of the American Medical Association reported that the physician risks an action for malpractice because of unsatisfactory results due to the unfitness of the donor.<sup>38</sup> Under the general rule of malpractice, the

<sup>35</sup>*People v. Warhaftig*, Ind. No. 41-54 (Queens Co. Ct. 1954).

<sup>37</sup>Schwartz, *supra* note 20 at 90.

<sup>38</sup>147 J. Amer. Med. Assn. 250 (Sept. 15, 1951).

<sup>36</sup>See *e. g.*, N.Y. Civ. Prac. Act §1153.

amount of care to be used by the physician varies with the circumstances of each case. In an undertaking of this sort the nature of the case would require care in a degree never before assumed by the medical profession. "In AID, the physician acts as the agent to bring into being a life outside the marriage relation. Even ignoring the moral aspects of the case, that is new and outside the scope of anything the physician has ever undertaken before."<sup>39</sup>

### Liability of the Donor

The legal position of the donor in artificial insemination is one largely of liabilities and responsibilities. It looks as if he has little to gain and possibly much to lose.

The donor may possibly be held for the support of the child or children he has fathered, in the event that the husband of the mother should refuse at any time to support the "test tube" baby. For example, in New York, Section 101 of the Social Welfare Law provides that the father of a person liable to become in need of public assistance or care shall be responsible for the support of such person. In New York City, the parents of an illegitimate child are liable for its support and the father is also liable for support of the mother.<sup>40</sup> What are the liabilities if the same donor should father many such children, maybe scores of them or possibly a hundred? The curious question presents itself, however, whether were he ever to be bothered by conscience or stirred by some parental urge, could he ever secure knowledge of his offspring and press at least for rights of visitation? It is easy to see the devastating effects such an eventuality could have on the husband, mother and child; yet

in the absence of controlling legislation, it remains a disturbing possibility.

If potential or actual adoption of the AID child by the husband of the mother is deemed to occur in those cases in which the husband of the mother consents to the artificial insemination, then there is some question as to whether the consent of the father of the child, the donor, has been obtained. For example, Section 111 of the Domestic Relations Law of New York provides that consent to adoption shall be required of the parents of a child born out of wedlock. In AID, must this consent of the donor be procured or is it "potential" and "implicit"? The section makes no provision for such modes of consent. It might be argued that in surrendering the semen the donor thereby gives his consent to the adoption of the child to be. But can consent to adoption be given at a time when no child is in existence? Or, is the consent of the father unnecessary since the same section provides that the consent shall not be required of a parent who has abandoned or surrendered the child? Does a donor in the act of donating or selling his seed thereby renounce all rights to the ensuing offspring? And is this a *legal* surrender or abandonment?

### Inadequacy of Proposed Solution

One solution to some of the problems created by artificial insemination, offered by many in good faith, is that the AID child be legally adopted by the husband of the mother thus legitimizing the child. This solution, however, has the unique disadvantage of favoring the birth of illegitimate babies so that they may be made legitimate by adoption. Besides, a good number of these babies will never be adopted either through the neglect of the parents or by the furtive hope that the secret transaction be-

<sup>39</sup>Schlemer, *Artificial Insemination and the Law*, 30 Mich. S. B. J. 51 (1953).

<sup>40</sup>N.Y.C. Crim. Cts. Act §62.

tween patient, physician and donor will never see the light of day. There is the objection too that formal adoption reveals highly personal information such as the artificial nature of conception, which becomes a matter of public record even though sealed. In some jurisdictions, it is possible that an adopting couple may run into statutes which set up sectarian limitations and the religion of the parents may be a source of difficulty and possibly the religion of the donor may become an issue and may have to be revealed. It is also a fact, well known to those who have gone through it, that adoption is a lengthy procedure, usually taking six months to a year, and one which can be costly as well. Finally, adoption may be beneficial for the child, but it still does not clear entirely the legal status of the parents nor does it solve the problem of physician and donor.

To date, legislation on artificial insemination has been proposed in several states, but none has been enacted into law. New York City, however, regulates the practice to some extent. Section 112 of the Sanitary Code provides that only a duly licensed physician "shall collect, offer for sale, sell or give away human seminal fluid for the purpose of causing artificial insemination. . . ." Regulations 1 through 6 of the same section provide for the physical examination of donors, their freedom from certain diseases and hereditary defects and blood tests. They also provide that whenever artificial insemination is performed, the physician shall keep a record showing the name of the physician, the name and address of the recipient, the results of the examinations as provided for above, and the date of the artificial insemination. The regulations provide, of course, that such records are confidential and shall be open only to authorized persons. The

records required to be kept by the Sanitary Code can be a source of worry and concern to husband and wife, physician and donor.

Since 1948 six states have attempted to pass statutes defining the status particularly of AID children.<sup>41</sup> In 1951 a bill was introduced into the New York State Senate<sup>42</sup> providing that where there is consent, express or implied, by the husband to the insemination, the child shall be deemed to be the legitimate, natural child of both husband and wife for all purposes; and husband and wife and child shall be in the relation of parent and child, and have all the rights and duties of that relationship, including rights of inheritance from each other. This bill failed to pass the legislature.

Legislative proposals in Virginia, Wisconsin and Indiana include provisions similar to the New York bill, and would consider children born of heterologous artificial insemination legitimate if both the husband and mother consent. A bill introduced into the Minnesota Legislature would make the practice of artificial insemination unlawful, but would declare legitimate children born as a result of it. Another bill in that state would regulate in detail the procedure. An Ohio proposal would prohibit heterologous artificial insemination entirely, would declare children so conceived illegitimate and would impose penal sanctions upon violators of the provision.<sup>43</sup>

As to the likelihood of any legislative action, one writer says: "The many problems, psychological, moral and legal, that could arise from any attempt to legalize this practice, are so great that it is doubtful if a

<sup>41</sup>157 J. Amer. Med. Assn. 1638, 1640 (Apr. 30, 1955).

<sup>42</sup>Sen. Int. No. 493, Pr. No. 493.

<sup>43</sup>157 J. Amer. Med. Assn. 1638, 1640 (Apr. 30, 1955).

physician [or anyone else] can look forward to the security of enabling or protective legislation other than the indirect approval afforded by Section 112 of the Sanitary Code of the City of New York."<sup>44</sup>

While many solutions have been suggested and much has been said from all sides, artificial insemination by use of a donor's sperm remains today one of the perplexing problems of law. This is, however, no ordinary problem. It is a problem which invades the very fabric of society — the home. At issue are very basic and fundamental values. Traditionally, the home has been regarded as the exclusive society of husband and wife and child. Each was joined to the other by ties more sacred than life itself. The child's birthright, his greatest possession, was the

certain knowledge of his parentage and his secure status of legitimacy. These concepts are now in the balance.

The precedents of courts or the statutes of the legislature, however, are not the total answer, for implied in artificial insemination are religious and moral values, the ethical principles which underlie human behavior and the conduct of society. A complete answer would also have to evaluate the social repercussions of such a practice: what effects would there be of a psychological and emotional nature upon the husband, the wife and the donor? How will it affect the family life of the child? Will it change attitudes on marriage, adultery and legitimacy? These ethical and sociological aspects are to be reviewed in the October issue of THE CATHOLIC LAWYER.

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<sup>44</sup>Caddy, *supra* note 30 at 194.